

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

JAYLON JOHNSON,
Plaintiff,

VS.

**GILBERT HERRERA, WAGNER'S
CARNIVAL, ALMEDA MALL,
ANTHONY SCHIMIDT,**
Defendants.

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Case. No. 4:23-cv-00638

MOTION TO EXTEND TIME FOR SERVICE OF COMPLAINT

TO THE HONORABLE LEE ROSENTHAL

Plaintiff, by and through his undersigned counsel and pursuant to Fed. R. Civ. P.4(m), hereby move this Court for the entry of an Order extending the time for service of the complaint on Defendant, Gilbert Herrera for a period of 30 days. In support of this Motion, Plaintiff refers the Court to the memorandum, below:

SUPPORTING MEMORANDUM

Rule 4(m) of the Federal Rules of Civil Procedure provides that the summons and complaint shall be served on a defendant within 90 days after the filing of the petition. If the deadline is not met, the Rule allows for the Court to direct that service be effected within a specified time. The Pro Se Plaintiff sent defective service of summons and complaint. Under Rule 4(m), the deadline to serve these defendants expired 90 days after filing the lawsuit.

There have been multiple attempts to serve Defendant Herrera, personally and through the state district clerk's office but each attempt has been unsuccessful. The statute of limitations, in this case, expired on or about May 16, 2023. Federal rules of procedure 4(m) provide. Under Rule 4(m) and the order of this court, Plaintiff's time to serve the defendants within 90 days, unless an extension is sought and granted.

In the Fifth Circuit case, the Court found an extension should be granted, and only after failing to serve, once the extension was granted. Also in Thrasher, counsel appeared on behalf of Thrasher in October but did not respond to the pending motion to dismiss for almost six months and did not perfect service on the City until November 29, 2010, and on Castillo until December 13, 2010—over five months after Thrasher's motion to extend the time for obtaining service. *Thrasher v. City of Amarillo*, 709 F.3d 509, 510 (5th Cir. 2013).

The Fifth Circuit held "[i]f the applicable statute of limitations likely bars future litigation, a district court's dismissal of claims under Rule 4(m) should be reviewed under the same heightened standard used to review a dismissal with prejudice. Because dismissal with prejudice is an extreme sanction that deprives a litigant of the opportunity to pursue his claim, it is warranted only where a clear record of delay or contumacious conduct by the plaintiff exists and a lesser sanction would not better serve the interests of justice. To warrant dismissal, we must find a delay longer than just a few months. *Id.* at 512-13. Although it has been months, the service was defective not simply because of lack of effort.

If the court grants the Defendants' Motion to dismiss based on service, the dismissal would result in a dismissal with prejudice, a harsh penalty.

The Defendant is not prejudiced by the Extension, nor have they alleged any prejudice.

The defendant has been evading service and has constructive notice of the claims against him. He will suffer no prejudice in receiving service of the lawsuit within the next 30 days and after the deadline of the expiration of the 30 days extension granted. If the motion to dismiss based on failure to timely serve process within 90 in compliance with Rule 4(m) is granted the dismissal would result in a dismissal with prejudice although the rules require the dismissal be without prejudice.

Plaintiff at all times acted in good faith and has good cause for the relief sought. Plaintiff has attempted to serve the defendant without success.

Based on the foregoing, Plaintiff respectfully requests that this Court enter an Order allowing 30 additional days of the signing of the court's order granting the motion in which to serve the summons and complaint on Defendant Gilbert Herrera.

Respectfully submitted,
THE LEWIS LAW GROUP PLLC
By: /s/U.A. LEWIS

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CERTIFICATE OF CONFERENCE

Plaintiff's counsel and conferred on May 22, 2023 via email and the Counsel for defendants has indicated they are opposed to this motion.

/s/U.A. LEWIS
U.A. LEWIS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded to each counsel of record through ECF on the date of this filing.

/s/ U.A. Lewis
U.A. Lewis